Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
IP-Enabled Services	)	WC Docket No. 04-36

COMMENTS OF

Z-TEL COMMUNICATIONS, INC.

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May 28, 2004

SUMMARY

Z-Tel Communications, Inc. ("Z-Tel") currently is deploying IP equipment in several metropolitan areas and hopes to provide broadband, Voice-over-Internet Protocol ("VoIP") services to medium-sized business customers throughout the United States. The Commission's grandiose plans to create, virtually out of whole cloth, a "new" hybrid regulatory regime for "IP-enabled services" directly threatens the deployment of that technology by competitive entrants like Z-Tel. Z-Tel is making investment and corporate organization decisions *today* based upon its interpretation of its regulatory rights as a common carrier under Title II, and by extension, the regulatory requirements that apply (or do not apply) to the VoIP services it is deploying. The Commission's *IP-Enabled Services NPRM* throws those legal rights into question – *precisely* at the time that Z-Tel is beginning to construct its VoIP network.

In proposing to write technology- and service-specific rules, the Commission is poised to repeat the mistakes of the past. Thirty-eight years ago, the Commission began to examine the appropriate regulatory response (if any) to the convergence of communications and computer technology. Unfortunately, after years of study, the Commission initially responded to this challenge with the wrong approach. In *Computer I*, the Commission embarked upon an admittedly "ad hoc" regulatory regime that, instead of establishing hard-and-fast distinctions among service categories, compared "hybrid" communications/data processing services to one another to determine which should be regulated and which should not. The system was unworkable and was abandoned only a few years after its adoption.

In the wake of the *Computer I* failure, the Commission abandoned the hybrid service-specific approach to regulation and adopted the "basic/enhanced" definitions that remain in place today. The Commission regulates as "basic" all forms of "transmission" services, while leaving

unregulated all other service enhancements utilizing basic services. The Commission's basic/enhanced distinction was so successful that Congress enacted them nearly verbatim in the 1996 Act.

The *Computer II* regime succeeded because it recognized – and regulated – the "basic" or "telecommunications" layer that underlies *all* "enhanced" or "information services." The *Computer I* regime failed because it attempted to regulate certain bundles of combined basic and enhanced services (those that resembled common carrier "communications") but not other basic/enhanced service bundles – and companies immediately began to take advantage of the ad hoc approach to these "hybrid" services by artificially structuring products solely to arbitrage the regulatory regime.

The *IP-Enabled Services NPRM* proposes to define as "telecommunications services" – and thereby apply Title II regulation – those services that are "substitutes" for, or demonstrate "functional equivalence" to, "traditional" voice telephone service. The adoption of such a hybrid approach would result in a hodgepodge of technology-specific regulatory requirements and prematurely deregulatory approaches that may prove both impossible to administer and indecipherable to the uninitiated.

As a result, Z-Tel urges the Commission to approach this rulemaking with caution but also with expedition. Z-Tel broadly supports the "layered" proposals several commentators have begun to articulate and which the Commission discusses in paragraph 37 of the *NPRM*. Such an approach should preserve nondiscrimination requirements and even extend the interconnection and wholesale network access regulations present in Title II of the Communications Act of 1934 (the "Act") (including sections 201, 202, 251, 252 and 271). Such interconnection and wholesale network access policies are crucial for competitive markets at the "application services" layer –

the layer of services riding over the network – to develop and thrive. Z-Tel believes that interconnection and wholesale network access regulation is needed to prevent the exercise of market power. If such regulation is successful, a number of deregulatory approaches to the "application services" layer can be implemented.

In short, while the Commission should not, as the *NPRM* suggests, create a far-reaching new regulatory regime that will increase the cost and inhibit the development of innovative new services, neither should it abandon regulation needed to ensure the free flow of new offerings. From common law times, lawmakers have recognized the need to regulate bottlenecks and market power to ensure consumer access to the goods and services they desire. This Commission should not simply dismiss Title II access requirements dating back to core common law principles, but should endeavor to adapt those principles – consistent with their original pro-competitive purposes – to the new IP environment.

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I. INTRODUCTION

Thirty-eight years ago, the Commission observed that the "modern-day electronic computer is capable of being programmed to furnish a wide variety of services, including the provision of all kinds of data and the gathering, storage, forwarding, and retrieval of information – technical, statistical, medical, cultural, among numerous other classes" and that "as part of the natural evolution of the developing communications art . . . common carriers, whose rates and services are subject to governmental regulation, are employing computers as a circuit and messaging switching device.[1] The Commission launched the *Computer I* proceeding to determine the appropriate regulatory response (if any) to the convergence of communications and computer technology.[2] Since 1966, computer and microprocessor technology has certainly

[1] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, Notice of Inquiry, 7 F.C.C.2d 11 at ¶¶ 1, 9, 12 (1966).

[2] *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Final Decision and Order, 28 F.C.C.2d 267 (1971) ("*Computer I Final Order*").

changed and improved – but the issue the Commission faced in *Computer I* is eerily similar to the issue the current Commission faces in the *IP-Enabled Services NPRM*.[3]

Unfortunately, after years of study, the Commission initially responded to this challenge with the wrong approach. In *Computer I*, the Commission embarked upon a regulatory regime that, instead of establishing hard-and-fast distinctions among service categories, compared "hybrid" communications/data processing services to one another to determine which should be regulated and which should not. The system was unworkable and was abandoned only a few years after it was ceremoniously adopted.

In the wake of the *Computer I* failure, the Commission adopted the "basic/enhanced" definitions that essentially remain in place today. The Commission abandoned the hybrid service-specific approach to regulation and instead decided that it would regulate as "basic" all forms of "transmission" services and that it would not regulate all other service enhancements that utilized basic services.[4] The *Computer II* definitional regime has succeeded remarkably – the Internet literally grew up free from monopoly and regulatory control while this definitional regime was in place. Likewise, consumer choice in CPE flourished, because the monopoly owners of the local and long-distance networks could not prevent enhanced service providers from developing and deploying advanced technologies on what became know as the "End-to-End" telecommunications architecture. Indeed, the Commission's basic/enhanced definitions

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3 *IP-Enabled Services,* Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (rel. March 10, 2004) ("*IP-Enabled Services NPRM*" or "*NPRM*").

4 *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Order, 77 F.C.C.2d 384 at ¶ 9 (1980) ("*Computer II Final Order*").

were so successful that Congress enacted them nearly verbatim in the Telecommunications Act of 1996 (the "1996 Act").[5]

The *Computer II* regime succeeded because it recognized – and regulated – the "basic" or "telecommunications" layer that underlies *all* "enhanced" or "information services." The Commission felt safe in deregulating enhanced services because *all* enhanced services *must* utilize a "basic" component, and the Commission retained the ability to exercise direct jurisdiction over those "basic" functionalities. The *Computer I* regime failed because it attempted to regulate certain bundles of combined basic and enhanced services (those that resembled common carrier "communications") but not other basic/enhanced service bundles. As a result, companies immediately began to take advantage of the ad hoc approach to these "hybrid" services by artificially structuring products solely to arbitrage the regulatory regime.

Sadly, the current Commission appears poised to repeat the mistake of *Computer I.* Contrary to the regulatory certainty that resulted from *Computer II,* the Commission notes in the *IP-Enabled Services NPRM* that "we do not believe that particular statutory classifications will lead inexorably to any particular regulatory treatment."[6] In essence, the *NPRM* proposes to adopt a new set of "hybrid" Title I/Title II rules that would ascribe particular forms of regulation based upon whether a service offers the "functional equivalence" to, or serves as a "substitute" for, "traditional telephony."[7] Moreover, the Commission proposes to create this hybrid regime only for services that utilize *one* particular type of network transmission technology – Internet Protocol ("IP").[8] The adoption of such a regime would result in a hodgepodge of technology-

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5 *NPRM* at ¶¶ 26-27.

6 *Id.* at ¶ 43.

7 *Id.* at ¶ 37.

8 There is a danger in technology-specific regulation. For example, in the *NPRM*, the Commission cites declines in interstate minutes of use to support its statement that IP

specific regulatory requirements and prematurely deregulatory approaches that may prove potentially impossible to administer and indecipherable to the uninitiated.

Z-Tel Communications, Inc. ("Z-Tel") currently is deploying IP equipment in several metropolitan areas and hopes to provide broadband VoIP services to medium-sized business customers throughout the United States. The *NPRM* appropriately recognizes the significant potential consumer benefits of IP technology for consumers nationwide, and Z-Tel stands ready to provide those services to our customers. However, the Commission's grandiose plans to create, virtually out of whole cloth, a "new" hybrid regulatory regime for "IP-enabled services" directly threatens the deployment of IP technology by competitive entrants like Z-Tel. Z-Tel is making investment and corporate organization decisions *today* based upon its interpretation of the regulatory rights and requirements that apply (and do not apply) to the VoIP services Z-Tel plans to deploy. For example, to facilitate its VoIP rollout, Z-Tel is exercising its rights as a Title II "common carrier" to obtain collocation, unbundled loops, and unbundled transport from incumbent local exchange carriers ("ILECs"). The Commission's *NPRM* throws those legal rights into question – *precisely* at the time that Z-Tel is beginning to procure VoIP equipment from vendors like Cisco Systems.

In Z-Tel's view, there is no need for the Commission to undertake this rulemaking, as the current definitional regime has been remarkably successful and sufficiently flexible. With regard to virtually all of the issues raised in the *NPRM*, such as E911, CALEA, and state preemption,

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technologies "may challenge the central role that legacy technologies" have played in the PSTN. *NPRM* at ¶ 3 n.11. However, Verizon and BellSouth recently told the Commission that Internet traffic is actually causing a substantial *increase* in the use of their circuit-switched networks. More specifically, Verizon and BellSouth told the Commission that consumers utilizing Internet applications are "requiring the incumbent to add new switches or expand existing switches to handle the increased burden." Letter from Ann D. Berkowitz, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-98 and 99-68, Attachment ("Internet-Bound Traffic is Not Compensable Under Sections 251(b)(5) and 252(d)(2)") at 42 (filed May 17, 2004).

several petitions and proceedings are already pending before the Commission. The records in those dockets would have enabled the Commission to reach definitive rulings this year, so there was no need to toss out a number of additional and unnecessary questions in the *NPRM*. For example, the *Pulver.com Order*[9] and *AT&T VoIP Access Charge Order*[10] could have provided the foundation for the Commission to build on the definitional structure of the 1996 Act discussed in the *Stevens Report*.[11] This would have provided regulatory certainty needed by entrants like Z-Tel. The *NPRM* destroys any potential for stability with its clarion declaration that VoIP providers should not view those two decisions as prejudicing any result in this docket. Z-Tel, its investors, and presumably other aspiring entrants can no longer count on the Commission's existing definitions or classifications in making business plans and investment decisions.

As a result, Z-Tel urges the Commission to approach this rulemaking with caution but also with expedition. Z-Tel broadly supports the "layered" proposals several commentators have begun to articulate and which the Commission discusses in paragraph 37 of the *NPRM*. Such an approach should preserve nondiscrimination requirements and even extend the interconnection and wholesale network access regulations present in Title II of the Act (including sections 201, 202, 251, 252 and 271). Such interconnection and wholesale network access policies are crucial for competitive markets at the "application services" layer to develop and thrive. Z-Tel believes that interconnection and wholesale network access regulation is needed to prevent the exercise of

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9 *See Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (rel. Feb. 19, 2004) ("*Pulver.com Order*").

10 *See Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, WC Docket No. 02-361 (rel. Apr. 21, 2004) ("*AT&T VoIP Access Charge Order*").

11 *See Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501 (1998) ("*Stevens Report*").

market power, and if such regulation is successful, a number of deregulatory approaches to the "application services" layer can be implemented. However, the Commission cannot blind itself to the competitive issues that arise when an entity that controls a network transmission facility also offers retail services. Indeed, policies such as those of BellSouth and SBC – which tie DSL to analog dial-tone service – should be prohibited, because they stand in the way of service providers that seek to utilize the DSL network transmission capability to provide end user customers with a substitute for the ILEC's analog dial-tone service.

A successful "layered" approach to regulation must also recognize its own inherent limitations. Many of the "common carrier" rules discussed in the *NPRM* have, at their core, social policy and economic efficiency objectives and would need to be applied to the "applications services" layer. From common law times, lawmakers have recognized the need to regulate bottlenecks and market power to ensure consumer access to the goods and services they desire. This Commission should not simply dismiss Title II access requirements dating back to core common law principles, but should endeavor to adapt those principles – consistent with their original pro-competitive purposes – to the new IP environment.

II. LEARNING THE LESSONS OF HISTORY: COMPUTER I AND THE FAILURE OF "HYBRID" SERVICE REGULATION

Section III of the *NPRM* describes several potential approaches to categorizing IP-enabled services, including the "layered" approach that Z-Tel largely supports. The Commission's other proposals for categorizing IP-enabled services in Section III would result in confusion and uncertainty that would ultimately undermine the pro-investment thesis of the Commission's broadband policy.

The Commission proposes that it categorize certain IP-enabled services as "telecommunications" services if: (1) those services demonstrate "functional equivalence to

traditional telephony"; (2) those IP-services are "used in lieu of" traditional telephony; or (3) those services interconnect with the PSTN or utilize North American Numbering Plan resources.[12]

All three proposed approaches are in direct conflict with the Act and Commission precedent. The statutory definition of "telecommunications services" is not limited to "traditional telephony," and "common carrier" regulation under Title II has historically applied to high-bandwidth services, such as video delivery for television networks and advanced services.[13] Moreover, the Commission cannot simply cite its authority under sections 1 and 4(i) of the Act to treat these statutory classifications as irrelevant or as a "default regulatory framework" that the Commission can change at will.[14] In addition, the Commission's section 10 forbearance authority is significantly limited when it comes to forbearance of statutory terms.[15] Forbearance from statutory requirements presents significant constitutional issues.[16]

In short, the Commission should not determine that services that utilize IP need only be treated as "telecommunications services" if they resemble "traditional telephony" because doing so would require reconstructive surgery on the remainder of Title II and decades of

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12 *NPRM* at ¶ 37. *See also* ¶¶ 45-49, which discuss these proposals in greater depth.

13 Indeed, in the *Computer II* proceeding, the Commission initially proposed to distinguish between "voice" and "non-voice" basic services and rejected that approach. The Commission recognized that such a distinction injected unnecessary regulatory uncertainty into its definitions that did not reflect reality, as "the incorporation of voice and data transmission capabilities into the network is inherent in the basic services category…Telecommunications service is no longer just 'plain old telephone service' to the user." *See Computer II Final Order,* 77 F.C.C.2d 384 at ¶¶ 91-94. Therefore, the Commission's observation in the *NPRM* that "traditional economic regulation designed for the legacy network should not apply outside of the context of the PSTN" contradicts decades of Commission precedent. *See NPRM* at ¶ 35 n.116.

14 *See NPRM* at ¶¶ 46, 49.

15 *See id.* at ¶ 47.

16 *See Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Opposition of Z-Tel Communications, Inc., to Petition for Forbearance of Verizon, CC Docket No. 01-338 at 13-18 (filed Sept. 3, 2002).

accompanying Commission precedent. Indeed, the Commission has a long history of treating various packet-switching technologies as "basic" services or "telecommunications services."[17]

Moreover, an approach that establishes federal jurisdiction over a service based on its substitutability for traditional telephony would, in the long run, be entirely unworkable. In *Computer I*, the Commission tried a similar approach to determining the regulatory classification of certain hybrid communications/data processing services by comparing them to traditional communications services.[18] At that time, two key issues faced the Commission. First, the Bell System had raised allegations that a new upstart competitor (IBM) was deploying a mainframe-client computer network architecture that should be regulated as a "common carrier" service. Of course, with a statutory interstate common carrier monopoly, the Bell System would have liked to appropriate that promising technology for itself. The other crucial issue was whether a particular regulatory classification of "data processing" would free the Bell System from the 1956 *Western Electric Consent Decree*, which prevented the Bell System from providing CPE that contained data processing services. The 1956 Consent Decree was entered into because the Department of Justice wanted to prevent the Bell System from leveraging its common carrier monopoly into the market for data processing services.

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17 *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21958 at ¶ 107 (1996); *In re Independent Data Communications Manufacturers Ass'n, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 13717 (1995) ("*Frame Relay Order*").

18 In the *Computer I Final Order*, the Commission noted that "we are prepared to render ad hoc evaluations with respect to 'hybrid services' to determine whether a particular package service offering is essentially data processing or communication…. We believe that imposition of regulatory constraints over what is clearly a data processing hybrid offering, even though it contains communications elements which are an integral part of and an incidental feature thereof, would tend to inhibit flexibility in the development and dissemination of such valuable offerings and thus would be contrary to the public interest." *Computer I Final Order,* 28 F.C.C.2d 267 at ¶¶ 27-31.

Within a decade, however, the flexible *Computer I* "hybrid service" regime adopted in *Computer I* was, in the words of the Commission, "overrun": "We are faced with the reality that technology and consumer demand have combined to so overrun the definitions and regulatory scheme of the First Computer Inquiry that today no comparable, minimally enduring line of demarcation can be drawn."[19] The Commission observed that the service-by-service hybrid approach, which focused exclusively on the services provided and did not reflect underlying network architecture, led providers to "artificially structure[]" their services "so as not to come under our regulatory umbrella."[20]

The Commission decided that establishing "mutually exclusive" definitions of "basic" and "enhanced" services was far preferable to the "hybrid" regime. The key benefit to the basic/enhanced services distinction is the recognition that *all* "enhanced" services must utilize a "basic" services component. Hence, the Commission found that it could effectively deregulate all "enhanced services" because the Commission could "rely on the direct regulation we retain with respect to the independent provision of basic services."[21]

The *Computer II* definitions, which the Commission has held are virtually identical to the definitions of "telecommunications" and "information services" in the 1996 Act, do *not* focus on whether a service "looks like" any existing common carrier service. Instead, these definitions

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19 *Computer II Final Order,* 77 F.C.C.2d 384 at ¶ 111. In the *Computer II* proceeding, the Commission noted that one problem with the "hybrid" approach was that it offered providers the opportunity to game the system, noting that whether a service became regulated was "in reality… simply… a factor in how the offering entity packages the service." *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),* Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 F.C.C.2d 358 at ¶ 78 (1979). In the *Computer II Final Order,* the Commission noted its "repeated unsuccessful attempts" at classification of several hybrid services, stating that the process "means that [a provider's] services must be artificially structured so as not to come under our regulatory umbrella." *Computer II Final Order* at ¶¶ 111, 120.

20 *See Computer II Final Order* at ¶ 111.

examine (and potentially regulate) the component of the service that "transmits information of the user's choosing" without any net change in the form or content of that information.[22] By definition, all "information services" must utilize "telecommunications,"[23] and central to this regulatory paradigm is the continued applicability of certain forms of regulation to "telecommunications" and "telecommunications services."

The *Computer II* approach is effective because the distinction between "transmission capability" (*i.e.*, a basic service) and "applications that utilize the transmission capability" (*i.e.*, an enhanced service) meshes with the way computer and communications networks have been efficiently engineered. Computer network engineers call this characteristic of network design the "End-to-End" approach.[24] Open End-to-End approaches to network design maximize the number of entities that can utilize the network and do not favor one particular application over another. As Saltzer, Reed and Clark once observed, "had the original Internet design been optimized for telephony-style virtual circuits (as were its contemporaries SNA and TYMNET), it would not have enabled the experimentation that led to protocols that could support the World-Wide Web, or the flexible interconnection that has led to the flowering of a million ISPs."[25] The *Computer II* regulatory paradigm essentially wrote End-to-End network design into the legal structure of the Act – and the result was investment into new and important "enhanced" uses of the "basic" transmission networks like the World-Wide Web itself, because innovators knew that

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21 *See id.* at ¶ 132.

22 47 U.S.C. § 153(43).

23 *See* 47 U.S.C. § 153(20) (an "information service" is provided "via telecommunications.").

24 *See, e.g.,* Jerome H. Saltzer, "End-to-End Arguments in System Design," www.mit.edu/Saltzer/www/publicstions; Jerome H. Saltzer, David P. Reed, and David D. Clark, "Comment on Active Networking and End-to-End Arguments, IEEE Network 12, 3 (May/June 1998).

25 *Id.* at 70.

they would have the ability to provide those services over a neutral "basic" transmission network.

The *NPRM* steps away from this approach and attempts to "redefine" or "reclassify" IP-enabled services in some ostensibly new and innovative way that will create a "minimally regulated" space.[26] But throughout the *NPRM*, the Commission fails to recognize that *Congress* already has written the definitions of "telecommunications," "telecommunications service" and "information service" for the Commission. Indeed, as the Commission itself recognized in 1998, "Congress intended the definitions of 'telecommunications,' 'telecommunications service' and 'information service' to build upon the frameworks established prior to the passage of the 1996 Act, including the MFJ and Commission precedent."[27] Congress has essentially codified the Commission's *Computer II* definitional paradigm. It is the Commission's job to implement Congress' requirements, not rewrite them.

The Commission has applied the current definitions to advanced and packet-switched networks for years. For instance, the Commission has determined that frame relay and other packet-switched services constitute "common carrier" services when those services have particular characteristics.[28] In addition, the Commission developed precedent on the difference between "private carriage" and "common carriage." As the Commission observed in the *Frame Relay Order,* the distinction between common carriage and private carriage cannot be "centered

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26 *NPRM* at ¶ 5.

27 *Implementation of the Non-accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 13 FCC Rcd 11230 at ¶ 29 (1996), *remanded on other grounds*, 16 FCC Rcd 9751 (2001) ("*Non-Accounting Safeguards Remand Order*"); *see also Stevens Report*, 13 FCC Rcd 11501 at ¶ 45 (1998) ("Congress intended the 1996 Act to maintain the *Computer II* framework."); *Id.* at ¶ 39 ("Congress built upon… *Computer II*.").

28 *See Frame Relay Order,* 10 FCC Rcd 13717.

solely on the complexities of the technology itself," because "carriers could argue that virtually any technically complicated communications service requiring customer-specific solutions is provided through private carriage. A carrier cannot vitiate its common carrier status merely by entering into private contractual relationships with [its] customers."[29]

Common carrier regulations can also apply to firms that "self-provide" telecommunications services as part of a finished enhanced services product. In ruling that GTE could tariff broadband DSL service as an interstate telecommunications service, the Commission observed that "an otherwise interstate basic service . . . does not lose its character as such simply because it is being used as a component in the provision of a[n enhanced] service that is not subject to Title II."[30]

Throughout this line of Commission decisions, the Commission did not even consider whether the service in question had the "functional equivalence" of, or was comparable to, "traditional telephony." Moreover, the statutory definitions extend beyond wireline firms and are also used in the licensing of satellite and wireless operators. Even section 332(c) of the Act, often cited by ILECs as a model for how their dominant local telecommunications networks should be regulated, classifies every commercial mobile radio service provider "as a common carrier for purposes of" the Act, and *requires* that the Commission impose the nondiscriminatory access provisions of sections 201 and 202.[31]

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29 *Id.* at ¶ 52.

30 *GTE Telephone Operating Cos. GTOC Tariff No. 1*, 13 FCC Rcd 22466, ¶ 20 (1998) (quoting *ONA Plans Order,* 4 FCC Rcd 1, 141 (1988)).

31 47 U.S.C. § 332(c)(1)(A). The Commission may exempt CMRS providers from other Title II requirements, but only if it makes the specific factual findings outlined in § 332(c)(1)(A). Those specific factual findings are essentially the same as the general section 10 forbearance findings listed in 47 U.S.C. § 160(a), which apply to all Title II carriers.

The current Commission should learn from the *Computer II* success story. Yet the *IP-Enabled Services NPRM* contains myriad proposals that would blur the lines between "telecommunications" and "information services." And under the cloak of "deregulation," it would simultaneously subject a broad array of Internet software applications to regulation while freeing firms with market power (namely the ILECs) from fundamental wholesale access requirements established by Congress in the 1934 and 1996 Acts. A hybrid, service-specific definitional approach that does not include commensurate requirements for access to basic transmission capability will curtail innovation because entrepreneurs will not have any clear assurances *ex ante* as to whether they will be able to deploy their services on a network, or whether regulatory obligations will apply to their service offerings.

For this reason, Z-Tel believes that the "functional equivalence" and "substitutability" approaches proposed in paragraph 37 of the *NPRM* should be rejected insofar as they apply "telecommunications" and "telecommunications service" regulation only to services that look like "traditional telephony" services. Those proposals bear no relationship to the statutory definitions of "telecommunications" and "telecommunications services" and would, in the long run, be unsustainable and rife for gamesmanship, as the Commission learned in the wake of its similar *Computer I* "hybrid services" approach. Z-Tel instead favors a "layered" approach. Such an approach should ensure network access on vibrant wholesale terms that would be imposed upon the "network transmission" layer. Further, it would accommodate regulation of certain applications on the "access services" layer to accomplish certain social policy goals.[32]

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[32] Sections II-III, *infra,* discuss Z-Tel's proposed framework.

III. A LAYERED REGULATORY APPROACH TO "ECONOMIC" REGULATION: THE OVERRIDING NEED FOR WHOLESALE NETWORK ACCESS

Z-Tel supports the Commission's proposal that regulation focus upon bottleneck transmission facilities that can be used to extend or enhance market power.[33] Indeed, Z-Tel believes this approach should be utilized for *all* services – not simply those that utilize the Internet Protocol. Therefore, Z-Tel believes that the Commission should retain and even extend the "economic regulation" discussed in paragraphs 72-74 of the *NPRM* to ensure that there are robust, competitive alternatives for network transmission infrastructure.

A. Access to ILEC Local Networks is Crucial for Competitive Deployment of VoIP Services.

The ability to obtain access to local transmission networks is of particular concern to Z-Tel – indeed, as far as Z-Tel is concerned, all of the other issues discussed in the *NPRM* would be moot if Z-Tel cannot access local transmission networks to provide its VoIP services. The existing "economic" wholesale access regulations referenced in the *NPRM* are absolutely critical and should not be disturbed, no matter what application or service is provided over those local network transmission facilities.[34] Today, for example, Z-Tel can construct a carrier-quality, robust VoIP network by procuring equipment from several competing vendors and obtaining long-haul capacity from several rival interexchange carriers. But Z-Tel can today only turn to *one* ubiquitous source – the ILEC – for local, "last-mile" transmission facilities (principally high-capacity loops and enhanced extended links ("EELs")) in each metropolitan area where it wishes to provide service.

The local bottleneck in broadband, business-class services is very real and was demonstrated in the *Triennial Review* "impairment" hearings that several states embarked upon

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[33] *See NPRM* at ¶ 37.

in the last year. The Commission tasked state commissions with determining whether there were sufficient retail and wholesale alternatives to high-capacity loops and transport.[35] Hundreds of data requests were sent out, and CLECs, regardless of their business strategy, provided detailed network information that in many jurisdictions was subject to cross-examination by the ILECs and state commission staff. In those cases that have proceeded in the wake of the *USTA II* decision,[36] the lack of wholesale high-capacity loop alternatives, eight years after the passage of the 1996 Act, is stunning.

One example is a recent decision by a hearing examiner of the Michigan Public Service Commission, released on May 10. After extensive factual discovery, cross-examination, and hearings, the Michigan hearing examiner concluded that there was no evidence to show sufficient and adequate wholesale alternatives to high-capacity loops and transport *in any area of Michigan,* even downtown Detroit, where competitive providers have been attempting to construct networks for years.[37]

Empirical evidence also suggests that Bell companies retain significant market power over special access services, which the Bells claim is a substitute service for the unbundled transport, high-capacity loops and EELs that companies like Z-Tel need to provide VoIP

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34 *See id.* at ¶¶ 72-74.

35 *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order, Order on Remand, and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶¶ 328-340 (loops), ¶¶ 394-418 (dedicated transport) (rel. Aug. 21, 2003) ("*Triennial Review Order*").

36 *See United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir., March 2, 2004) ("*USTA II*").

37 *In the Matter, on the Commission's Own Motion, to facilitate the implementation of the Federal Communications Commission's Triennial Review determination in Michigan,* Proposal for Decision, Case No. U-13796 at 31-33 (loops), 43-46 (transport) (rel. May 10, 2004) (attached hereto).

services. In 1999, in response to Bell company requests, the Commission deregulated the rates, terms and conditions of the Bells' special access services in certain geographical areas based upon a set of "triggers" that commenters have termed "crude indicators of potential competition."[38] The result has been a disaster for companies that purchase these high-bandwidth special access circuits – prices have increased and quality has decreased. As Ford and Spiwak note:

> Deregulated tariffed prices for special access services are nearly ubiquitously higher than regulated prices … and for the data we collected, very few price reductions were observed over time for deregulated prices (*i.e.,* only 12 of 135 prices fell with about a 5% reduction on average). Thus, the price increases have been sustained over no less than an 18-month period.[39]
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> After an econometric analysis, Ford and Spiwak found:
>
> The price for Special Access service is priced at about three times incremental cost. The deregulated margin is about 14% above the regulated markup over cost. . . . [T]he price increases for Special Access services where pricing flexibility is granted appear to be predominantly driven by market power and not costs. Consequently, it appears that the wide geographic markets and collocation triggers of the Commission's deregulatory paradigm have led to an increased exercise of market power in (at least some) Special Access markets, thus placing an unnecessary drain on the U.S. economy."[40]

The premature deregulation of special access services in several metropolitan areas of the U.S. has had a devastating effect on the economy. Rappoport and Taylor estimate that a reduction in special access prices of 42% would generate 64,000 new jobs and $11.6 billion in new economic

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38 George Ford and Lawrence J. Spiwak, "Set it and Forget It? Market Power and the Consequences of Premature Deregulation in Telecommunications Markets," Phoenix Center Policy Paper No. 18 at 8 (July 2003), *available at* http://www.phoenix-center.org/pcpp/PCPP18.doc ("*Special Access Study*"); *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 at ¶¶ 8-10 (1999) ("*Pricing Flexibility Order*").

39 *Special Access Study* at 22.

40 *Id.* at 25-29.

activity in the one year, increasing to 132,000 new jobs (and $14.5 billion new economic activity) in the second year.[41]

The Michigan hearing examiner's factual analysis and the special access market power studies indicate that companies like Z-Tel, which seek to deploy VoIP services over broadband loops and transport, are utterly dependent upon access to ILEC local networks. Make no mistake: the competitive deployment of VoIP technology by entrants like Z-Tel depends upon the ability of entrants to access ILEC high-capacity loop and transport connections. Thus, regardless of whether and how the Commission imposes retail regulation and consumer protection requirements on IP-enabled services, the Commission must continue to regulate wholesale access to the ILECs' broadband transmission facilities.

B. A "Layered" Approach to Wholesale Network Access Policy.

At present, there are four statutory sources that mandate wholesale access to ILEC networks: sections 201-202, sections 251-252, and, for Bell operating companies, section 271 of the Act. Of these, the section 271(c)(2)(B) "checklist" is the most clear – Bell companies that choose to offer interLATA services must provide requesting carriers like Z-Tel unbundled access to "loop transmission," "transport" and "switching." 47 U.S.C. § 272(c)(2)(B)(iv), (v) and (vi). In the *Triennial Review Order*, the Commission decided that the section 271 checklist requirements were independent of section 251's unbundling requirements, and that the rates, terms and conditions of access under section 271 were to be governed by the principles of sections 201 and 202 of the Act. Notably, the ILEC petitioners in *USTA II* did not challenge that conclusion.

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[41] Paul N. Rappoport, Lester D. Taylor *et al.*, *Macroeconomic Benefits from a Reduction in Special Access Prices* (2003) *available at*: http://www.comptel.org/press/sparc_june12_2003_study.pdf.

Those statutory network access provisions should be the centerpiece of any "layered" approach to network access regulation, and no "re-classification" of IP-enabled services should permit an ILEC to escape its wholesale network access obligations. Nor should any "re-classification" of IP-enabled services make it impossible for a new entrant to qualify as a "requesting carrier" for purposes of section 251 and 271.

Accordingly, a "layered" approach to regulation should include several principles:

- *First,* while firms should be allowed to integrate and sell both network transmission services and retail applications to customers, firms should not be able to avoid the obligations placed upon network transmission service providers simply because they sell integrated services.

- *Second,* entrants like Z-Tel should not be prevented from organizing themselves as a common carrier in order to avail themselves of the rights that requesting carriers have under the Act, including but not limited to wholesale network access rights under sections 251 and 271.

- *Third,* network transmission service providers should be required to interconnect in all instances, not discriminate among customers, and, where market power is present (as it is with ILECs today), provide wholesale, cost-based access to those networks. As a result, sections 201, 202, 251, 252 and 271 should be retained for ILECs and the Bell companies. The overriding purpose of this regulation is to ensure that retail application providers have the ability to access interoperable and interconnected networks on a nondiscriminatory basis.

- *Fourth,* all retail application providers should have the right to receive communications from or make communications to the PSTN.

- *Fifth,* network transmission service providers with market power should be prohibited from tying the sale of any retail application service to the sale of any other product (such as tying DSL to analog voice).

The layers approach described above would permit the Commission to maintain the wholesale network access requirements of the Act, particularly section 271, as they relate to VoIP services. The Commission also must examine and intervene in situations where it is evident that a network owner such as an ILEC is utilizing its market power to leverage into adjacent services. One particularly important (and obvious) issue for VoIP are ILEC policies –

such as those advanced by BellSouth and SBC – that force DSL customers to purchase the ILEC's analog dial-tone service. Several states have intervened to block these tying arrangements. As Z-Tel and other commenters have pointed out in a pending proceeding, such ties could choke the development of VoIP services that compete directly against analog dial-tone services.[42] What consumer would purchase a VoIP dial-tone substitute from a non-facilities-based "application service" provider if that consumer were already required to purchase dial-tone as a pre-condition of obtaining broadband service? In the layered approach discussed above, DSL-dial-tone ties like BellSouth's need to be prohibited if it were shown that BellSouth had market power in the provision of one of those application services, or if it had market power in the provision of network transmission services.

This layered approach to economic regulation would attempt to quarantine economic regulation to instances of market power – namely, those instances where a provider controls access to a bottleneck transmission facility. With a few exceptions, the "layered" approach is not altogether different than the *Computer II* regime, the *Competitive Carrier* paradigm,[43] and the framework imposed by 1996 Act. Unlike the other approaches discussed in the *NPRM*,[44] the layered approach directly addresses the question of market power in the "last mile," including local broadband or narrowband access services.[45]

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42 *See, e.g., BellSouth Telecommunications, Inc. Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services By Requiring BellSouth To Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers,* Comments of Z-Tel Communications, Inc., WC Docket No. 03-251 at 11-13 (filed January 30, 2004); Letter from David L. Lawson, Counsel for AT&T Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-251 at 2 (filed April 28, 2004).

43 *See NPRM* at ¶ 37, n.123 (citing and summarizing *Competitive Carrier* proceedings).

44 *See id.* at ¶ 37.

45 *See, e.g., AT&T Submarine Sys., Inc.*, 13 FCC Rcd 21585 at ¶ 9 (1998), *aff'd*, *Virgin Islands Tel. Corp. v. United States*, 198 F.3d 921 (D.C. Cir. 1999); *accord FLAG Pacific Ltd. Application for a License to Land and Operate in the United States a Digital Submarine Cable Sys. Between the United States and Canada and Japan and Korea*, 15

Similarly, the Commission should immediately reject SBC's proposal to exempt any "IP-platform" from wholesale network access obligations simply because section 251 unbundling rules permits entrants to construct their own rival "IP platforms."[46] SBC's proposal would allow ILECs to exercise market power over the entire information services industry. Moreover, the certain availability of unbundled access, which is the stated predicate of SBC's proposal that any IP-platform should be free from wholesale access regulation, is simply absent at this time. Indeed, as of this writing, SBC is taking the position that the *USTA II* decision has vacated entirely the Commission's section 251 rules for unbundled transport, high-capacity loops and EELs – precisely the section 251 UNEs that competitors (including Z-Tel) need to construct the those rival IP platforms. Because of the legal uncertainty surrounding the section 251 unbundling rules, the Commission should dismiss SBC's Petition immediately.

Without robust, wholesale competitive local network alternatives for IP application service providers, the competitive nirvana that Commission foresees for retail IP services will be unrealized. The policy basis for significant economic and consumer protection deregulation of finished IP-enabled services depends *entirely* upon the existence of robust competition in the provision of those services and the provision of the key inputs (like network transmission) into those services. If the Commission establishes a paradigm that favors, even unwittingly, service providers that own networks to the detriment of application service providers or CLECs that do not own or completely control their own network (particularly "last mile" transmission facilities), the basis for deregulating retail services will simply not exist. American consumers

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FCC Rcd 22064 at ¶ 7 (2000) (finding that the public interest analysis focuses on whether an operator "will be able to exercise market power because of the lack of alternative facilities.").

46 *See Petition of SBC Communications Inc. For Forbearance From the Application of Title II Regulation to IP Platform Services,* Petition of SBC Communications, Inc. for Forbearance, WC Docket No. 04-29 (filed Feb. 5, 2004).

and businesses will be subject to only limited choices, innovation will depend upon what the network owners decide to deploy and when, and investment by companies like Z-Tel will be stranded.

IV. OTHER FORMS OF REGULATION: PRESERVING THE COMMON LAW PURPOSES OF COMMON CARRIAGE

The "layered" approach proposed by Z-Tel addresses *only* certain types of "economic" regulation currently found in Title II of the Act. Z-Tel cannot overemphasize the importance of ensuring that there is a vibrant, competitive wholesale market for network transmission services. There are a number of additional regulations in Title II and elsewhere that go beyond economic regulation and involve social policy choices that have evolved over time.

Under Z-Tel's "layered" framework, social policy regulation largely falls onto retail application providers. Accordingly, it is appropriate to consider precisely which applications should be subject to which social policies. However, in so doing, the Commission should once again recall the lessons of history and understand that many forms of "common carrier" regulation exist not only to control "virtual monopolies," but also to remedy clear instances of market failure and information asymmetries inherent in certain industries.[47]

Consider, for example, service quality regulations. At common law, "common farriers" were held to a higher standard of care than other bailees because they, as described by Justice Oliver Wendell Holmes, hold "a public calling."[48] According to Holmes:

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47 For a description of these potential problems that would arise from an entirely free and unregulated market, *see* G.A. Ackerof, "The Market for Lemons: Quality, Uncertainty and the Market Mechanisms," 84 *The Quarterly Journal of Economics* 488 (1970).

48 Oliver Wendell Holmes, *The Common Law*, http://www.law.harvard.edu/library/collections/special/collections/common_law/Lecture05.php.

> If damage had been done or occasioned by the act or omission of the defendant in the pursuit of some of the more common callings, such as that of a farrier, it seems that the action could be maintained, without laying an assumpsit, on the allegation that he was a "common" farrier. The latter principle was also wholly independent of bailment. It expressed the general obligation of those exercising a public or "common" business to practise their art on demand, and show skill in it. "For," as Fitzherbert says, "it is the duty of every artificer to exercise his art rightly and truly as he ought."[49]

At common law, common carrier regulation applied in several non-monopoly contexts where certain market participants could exercise market power, such as grain elevators. In *Munn v. Illinois*, the Supreme Court opined that grain elevator operators stand "in the very 'gateway of commerce', and take a toll from all who pass."[50]

The common law recognized that entities that stood "in the very gateway of commerce" – ferries, hoteliers, lorries, and, later, railroads,[51] grain elevators, telegraphs and telecom firms – could impede the development and progress of commerce if they were permitted to act in an unrestrained manner. As a result, common carriers – even non-monopolists – were required to provide service to all customers at just and reasonable rates. In exchange for these additional obligations, common carriers obtained certain protections, such as limited liability for failure to perform.

As the Commission considers whether to retain particular forms of Title II common carrier regulation – be it through a Title I re-definition process or through section 10 forbearance[52] – Z-Tel urges the Commission to study the free-market enhancing features that these "common carrier" regulations address. Not all "common carrier" regulation is directed at

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49 *Id.*

50 *Munn v. Illinois*, 94 U.S. (Otto) 113, 130 (1876).

51 *See* James W. Ely, Jr., *Railroads & American Law* (2001) at 71 ("As a business that transported goods and passengers from place to place, railroads were treated as common carriers"); *see id.* at 71-77 (describing common law treatment of railroads and railroad charters prior to state and federal statutory regulations).

regulating monopoly; rather, much of it is essential for a market economy to operate efficiently. Z-Tel suggests that many forms of consumer protection (*e.g.*, tariffing), nondiscrimination, and public safety regulation are needed – regardless of how competitive the market may be. They should not be thrown away lightly.

V. THE COMMISSION SHOULD ACT QUICKLY TO RESOLVE THE REGULATORY UNCERTAINTY THAT THIS PROCEEDING HAS CREATED

The Commission should proceed with this rulemaking quickly. The Commission already has a number of other rulemaking proceedings that consider the universal service, access charge, CPNI, CALEA, E911, and disability access issues associated with IP-enabled services and other advanced services.[53] With the issuance of this *NPRM*, the Commission is marking time in those

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52 *See footnote* 16, *supra.*

53 Without even regarding the network unbundling rules and the handful of petitions for forbearance filed by the Bell companies in the last two years, there are no fewer than a dozen proceedings currently pending before the Commission that involve the very issues raised by the *NPRM*. Those proceedings include: (1) *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* WC Docket 03-211 (2003) (jurisdiction); (2) *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities,* Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 6417 (1999) (disabled access); (3) *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) ("*Intercarrier Compensation NPRM*") (intercarrier compensation); (4) *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 11 FCC Rcd 4798 (2002), *vacated, Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003); (5) *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("*Wireline Broadband NPRM*"); (6) *Federal-State Joint Board on Universal Service,* Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952 (2002) (universal service); (7) *Level 3 Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-266 (2003) (access charges); (8) *Comment Sought on CALEA Petition for Rulemaking,* Public Notice, RM-108265 (2004) (CALEA); (9) *Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems,* Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 25340 (2003) (public safety); (10) *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Difficulties,* Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140 (2000) (TRS).

proceedings, rendering the extensive records already developed in those dockets virtually useless and subject to usurpation by the record of this docket.

Four public statements by Chairman Powell in each of the last four years demonstrate the enduring state of uncertainty in which the industry must operate. In 2001, when the Commission proposed to revamp the entire intercarrier compensation system, Chairman Powell stated:

> Since I arrived at the Commission, I have been known to talk about the public switched telephone network as the hub of a wheel, the spokes being the many companies (*e.g.,* paging companies, wireless carriers, ISPs, long distance carriers) that interconnect with and pass traffic to and from the wireline telephone network. . . . I support this [*Intercarrier Compensation*] *Notice* because it seeks comment on how we can make these varied intercarrier compensation regimes more consistent with each other and, thus, with competition.[54]

The Commission has taken no action in the *Intercarrier Compensation* proceeding since releasing that NPRM.

In 2002, Chairman Powell discussed broadband policy and declared:

> It is now time for fewer words and more action…. The FCC has stood back long enough, up until now making pronouncements in this area in piecemeal fashion…. We must now clarify the regulatory classification and treatment of these new services, so companies – incumbents and competitors alike – know what to expect and can make prudent decisions to build and enter these new markets…. This is *not* the time for timidity.[55]

While Z-Tel strongly disagreed with the Commission's proposal in that proceeding because it would have sharply curtailed competitive access to ILEC local networks, over two years later, the Commission has taken no further action in the *Wireline Broadband* proceeding. The current *NPRM* in this docket makes essentially the same definitional proposal, only this time the proposal is clothed as "IP-enabled services" and not "wireline broadband" services.

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54 *Intercarrier Compensation NPRM,* Statement of Chairman Michael K. Powell.

55 *Wireline Broadband NPRM,* Statement of Chairman Michael K. Powell.

In testimony before the Senate Commerce Committee on January 14, 2003, the Chairman said that:

> In the next six months, the Commission will complete many of the specific proceedings intended to advance the digital migration.… [T]hese next six months will be an incredibly busy and significant time for the Commission in the areas of local competition and broadband deployment policies.[56]

Thirteen months later, on February 24, 2004, Chairman Powell once again told the Senate Commerce Committee:

> The Commission is hard at work on these issues. We continue to work to bring alternative broadband Internet distribution networks to the American people. We have begun laying the foundation for a "light touch" regulatory environment for Internet voice services. We are focused on addressing and advancing our social objectives of public safety, universal service, homeland security and access for people with disabilities. The Commission is also working hard to reform our country's inter-carrier compensation regime. We are working with our colleagues elsewhere in the federal government and at the state and local level to develop a sound policy framework. Finally, we are keeping a watchful eye for anti-competitive conduct by owners of broadband networks to ensure our citizens can tap the full potential of the Internet in a broadband world.[57]

There is a recurring theme here. Unfortunately, with each pronouncement of an intention to make a profound change in the regulatory structure that is left uncompleted, the Commission unwittingly makes it increasingly difficult for new entrants to instill confidence in investors and vendors, retain employees, raise capital, and convince even customers to continue support our business.

In fact, the Commission now is sending mixed signals to companies like Z-Tel (and our investors, upon which we depend) about whether we are providing "the right type of VoIP

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[56] Proceedings specifically mentioned by the Chairman were the *Triennial Review Proceeding*, the 2001 proposed rules for UNE performance measurements in CC Docket No. 96-98, the aforementioned *Wireline Broadband NPRM*, the Second Cable Classification Item, and the ILEC broadband proposals announced in December 2002. Written Statement of Michael K. Powell Before the Committee on Commerce, Science and Transportation, United States Senate (Jan. 14, 2003).

service," or the VoIP service that the Commission may perchance decide to permit to remain unregulated. For example, in the *Pulver.com Order,* the Commission stated that it decided that the Pulver.com's FWD service was not a "telecommunications service" because it did not want to risk "eliminating an innovative service that, as noted by Pulver, promotes consumer choice, technological development and the growth of the Internet, and universal service objectives."[58] However, only two months later, in the *AT&T VoIP Access Charge Order,* the Commission imposed access charges on AT&T's VoIP services, noting that although IP technology might produce efficiencies in transmission, not applying access charges would "create artificial incentives for carriers to convert to IP networks."[59]

Based upon prior Commission precedent developed for other packet-switched technologies like frame relay and DSL, Z-Tel has its own view as to what regulatory regime applies to the equipment and services it is deploying today, whether access charges apply to those services, whether Z-Tel needs state CPCNs or licenses, and what taxes apply. Z-Tel has structured its business appropriately. However, the Commission now has thrown those interpretations entirely up for grabs in this proceeding by declaring its intent to regulate services that utilize IP differently than it regulates other packet-switched services like frame relay. At the same time, the Commission has kept open all of the prior outstanding dockets and proceedings referenced above in order to "preserve the Commission's flexibility," and the Commission specifically notes that it may issue decisions in those dockets "before the culmination of the instant proceeding."[60] The Commission must recognize that the *IP-Enabled Services NPRM* has

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57 Written Statement of Michael K. Powell Before the Committee on Commerce, Science and Transportation, United States Senate at 3-4 (Feb. 24, 2004).

58 *Pulver.com Order* at ¶ 20.

59 *AT&T VoIP Access Charge Order* at ¶ 18.

60 *NPRM* at ¶ 32, n.112.

injected regulatory uncertainty into Z-Tel's corporate structure and the services it provides.[61] The industry simply does not know whether the Commission will proceed in implementing new, IP-specific rules in this docket, or whether it will make decisions in the other dozen outstanding proceedings referenced in the *NPRM*. Z-Tel urges the Commission to dispose of this rulemaking as swiftly as possible, so as to remedy the harm and uncertainty that the Commission is imposing upon small service providers like Z-Tel.

As discussed above, the confusion and uncertainty spawned by the *NPRM* is unnecessary. The *Computer II Inquiry* framework was a success because it was focused upon the most important issue – market power over transmission facilities and services. It was also clear, and it led to case-by-case adjudication of disputes. And the administration of those definitions is supported by more than 20 years of precedent. Unfortunately, the Commission now appears ready to unseat all of this settled precedent by declaring that "IP-enabled services" – that is, a group of services that utilizes one particular technology for undertaking communications – will be subject to a different regulatory environment, one in which the Commission determines *ex ante* whether a particular regulatory pigeonhole applies.

The Commission does not have to take this approach. In fact, the *NPRM* is littered with references to open, fully-briefed proceedings that the Commission has either started on its own motion or initiated in response to petitions or requests for declaratory rulings over the last seven years. For some reason, the Commission has fostered industry uncertainty by not completing those proceedings in a timely manner.

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[61] *See Pulver.com Order* at ¶ 2 n.3 (limiting scope of order and referring legal status of all services that "in any way… that originate or terminate on the public switched telephone network" to the *IP-Enabled Services* proceeding).

Instead of using its authority under the existing approach – which would involve making some tough choices on access charges and universal service applicability – the Commission now proposes to develop a massively complex and legally suspect definitional and classification framework. That new framework could require years to sort out rights and responsibilities that are at issue today. Rather than solve problems, the *IP-Enabled Services NPRM* creates the appearance of action on issues that have been before the Commission for years. The 17-year cicadas are likely to come back before the industry sees a stable set of rules under the Commission's proposed IP-specific paradigm.

The definitional briar patch that the Commission has entered does not serve the interests of the public or the industry, as it discourages providers like Z-Tel from rolling out VoIP services pending completion of this rulemaking. If the Commission desires stability and certainty, the Commission could do a world of good simply by ruling promptly in the dockets already pending before it. Absent such prompt and courageous action, the Commission should proceed by adopting rules in this docket that preserve fully competitive alternatives, including rules that ensure wholesale access to the broadband networks of ILECs.

Respectfully submitted

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May 28, 2004